IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1105

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MICHAEL ROBAK, JR., C

HONORABLE ROBERT R. MERHIGE, JR., and
HONORABLE ALBERT V. BRYAN, JR.,
*Petitioners,*

—v.—

UNITED STATES BOARD OF PAROLE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**No.** .....

HONORABLE ROBERT R. MERHIGE, JR., and
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*Petitioners,*

—v.—

UNITED STATES BOARD OF PAROLE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Honorable Robert R. Merhige, Jr. and Honorable Albert V. Bryan, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 26, 1973.

### Opinions Below

The opinion of the Court of Appeals is unreported, is noted at 14 Cr. L. Rptr. 2144, and is set out in the Appendix, *infra,* p. 1a. The Court of Appeals issued an addendum to its opinion on November 8, 1973, which is reprinted in the Appendix, *infra,* p. 10a. The memorandum opinion and orders of the United States District Court are unreported and are set out in the Appendix, *infra,* pp. 14a, 19a, 29a, 36a and 46a.[1]

[1] Some of the District Court orders in question were issued orally during or at the conclusion of evidentiary hearings. Excerpts from the transcripts of those hearings are included in the Appendix.

## Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 26, 1973, and a timely petition for rehearing *en banc* was denied on October 17, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## Question Presented

1. Does the United States Board of Parole have such absolute discretion over parole release that a District Court's discovery orders, aimed at uncovering regulatory, statutory and constitutional violations, can be vacated by the extraordinary writ of mandamus?

## Statutory Provisions Involved

18 U.S.C. §4203 provides in pertinent part as follows:

> (a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

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## Constitutional Provisions Involved

AMENDMENT V— . . . DUE PROCESS . . .

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

## Regulations Involved

28 C.F.R. §214 (1973), 38 Fed. Reg. 26653 (1973), provides:

> Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall have been active in the development of the case. These reports may include the reports by the prosecuting officer and the sentencing judge, records from the Federal Bureau of Investigation, reports from the officials in each institution in which the applicant shall have been confined, all records of social agency contacts, and all correspondence and such other records as are necessary or appropriate for a complete presentation of the case. Before making a decision as to whether a parole should be granted or denied in any particular case, the Board will consider all available relevant and pertinent information concerning the case. The Board encourages the submission of such information by interested persons.

28 C.F.R. §2.50 (1973), 38 Fed. Reg. 26657 (1973), provides in pertinent part as follows:

To the end that the objectives and procedures of professionalized parole may be advanced and, more specifically, so that the channels of information vital to sound parole actions may be kept open and that offenders released on parole may be protected against publicity deleterious to their adjustment, the following principles relating to the confidentiality of parole records shall be followed by the Board:

* * * * *

(d) Other matters contained in parole records will be held strictly confidential and will not be disclosed to unauthorized persons.

## Statement of the Case

In August 1972 Bernard Novak, a federal prisoner, filed this action on behalf of himself and all other federal prisoners similarly situated. The complaint seeks declaratory and injunctive relief and alleges that the United States Board of Parole and its agents are violating their statutory authority under 18 U.S.C. §4203, as well as its own regulations, and that the Board is acting in an arbitrary, capricious and unlawful manner, as respects Novak and other members of his class by, *inter alia,* denying to them any due process in the consideration of their parole applications. Specifically, the complaint alleges that the Board refuses (1) to disclose the substance of their hearing examiner's recommendations and reports; (2) to afford the prisoners an opportunity to reply to adverse aspects of said reports and other materials in their files; and (3) to state meaningful reasons for their refusal to grant parole.

After a hearing on a preliminary injunction, the District Court (Hon. Robert R. Merhige, Jr.), on August 29, 1972, issued a memorandum opinion holding that there was a justiciable controversy, that the Board of Parole does not have absolute and unbridled discretion, that the court had jurisdiction and authority to grant the relief sought, and that the Board had violated its own regulations in failing to consider certain relevant information in connection with its consideration of Novak's application for parole. App., *infra,* p. 14a. Because the district judge expressed the opinion that that violation may have been inadvertent, he declined to issue preliminary relief, preferring to wait for a hearing on the merits and specifically deferred the determination of whether this was an appropriate class action "until the Court is satisfied, after the taking of discovery by the parties, that the conditions required warrant such declaration." App., *infra,* p. 18a. He directed the Board to review Novak's application for parole in the light of the previously overlooked relevant information.

The record upon which Judge Merhige's memorandum opinion was based shows that Novak became eligible and applied for parole release on November 3, 1971,[2] and was given a twelve month "set off," without any furnished reason, to be considered again in November 1972.[3] He then applied for special consideration to the Board of Parole in

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[2] Novak was first taken into custody, charged with two unarmed bank robberies on October 29, 1970, and thereafter pleaded guilty to one count of bank larceny.

[3] All factual material in the Statement of the Case is taken either from the August 29, 1972 opinion of the District Court or from the transcripts of the hearings held by the District Court on August 28, 1972, September 22, 1972, October 17, 1972, and January 17, 1973.

July 1972, asking for release in September 1972. At that time the Board was advised that he had completed his high school education while incarcerated, had achieved a score of 650 in the Scholastic Aptitude Test of the College Entrance Examination Board, was doing college level work at the Federal Reformatory, had applied for and been accepted as a full-time student for the Fall 1972 term at Community College of Philadelphia, had promises of two part-time jobs to defray his living expenses, and that he had the prospect of a tuition scholarship from the Philadelphia Friends Committee on Education. The Board was further advised that all of these arrangements might be nullified if he were not released in September 1972. Novak was recommended for parole release at that time by his prison course instructor, the prison psychologist, and his quarters officers. His application was submitted by and with the approval of his caseworker, and the institutional recommendation of the prison was for parole. The Board of Parole, in response to the July 1972 application, deferred any action until November 1972, refusing to advise Novak of their reasons.

The first explanation of the Board's action came when Dr. William E. Amos, a member of the Board, wrote, in response to an inquiry from Novak's Congressman, Rep. William J. Green, and stated that Novak had "adjusted satisfactorily in the institutional setting" and that "it appears that the parole plans are appropriate." He raised in that letter as negative factors the fact that none of the money robbed from the banks had been recovered and that Novak was a drug addict prior to being committed.

At the hearing on August 28, 1972, the Board of Parole filed an affidavit, executed on August 25, 1972, by Dr. Amos,

in which he listed the following factors as being considered in the decision to deny parole release to Novak: his history of drug use, various psychological factors, such as immaturity, superficiality, anti-social behavior, improper value system, and lastly, some minor disciplinary infractions while institutionalized. The emphasis was on psychological factors. A representative of the Board testified that the Board had been advised about some restitution of the stolen money and that information as to restitution was in their file but that they did no checking or verification of this, and that the statement recommending parole release from the prison psychologist was not part of the Board's file and was never considered by them. Thus the Board, by failing to consider the information on restitution and the statement of the psychologist, did not "consider all available and relevant information," in violation of their own regulation. 28 C.F.R. §214, 38 Fed. Reg. 26653 (1973).

At the review hearing ordered by Judge Merhige, the Board of Parole considered the previously missing recommendation of the prison psychologist as well as a new psychological evaluation ordered by them which supported immediate parole and on September 7, 1972, the Board granted parole to Novak effective December 4, 1972, but refused to disclose the reasons for delaying release beyond the time to which Novak's parole plans were geared.

On September 8, 1972, notices of deposition were issued and served upon the three members of the Board who had considered Novak's parole application and the Board moved to vacate the notice of depositions. A hearing was held on that motion on September 22, 1972. The District

Court (Merhige, J.) denied the motion and ordered the three members of the Board to submit to depositions.

At the hearing on September 22, 1972, an affidavit by Dr. Amos executed on September 19, 1972, was filed with the Court. This affidavit minimized the importance of the favorable psychological reports on Novak, although the earlier affidavit by Dr. Amos put a great deal of emphasis on psychological factors. This affidavit, for the first time, raised a question about Novak's post-release employment in a hospital, although the Board knew about this since June of 1972, and had made no previous comment about this employment. The affidavit claimed that Novak needed the time to December 4, 1972 so that " . . . he could develop plans for release . . . "[4]

The depositions were then scheduled for October 5, 1972. Without any notice to Novak or his counsel, the Board met again and granted parole release to Novak effective October 4, the day before the scheduled depositions, without furnishing any reasons for this change in release dates, and then moved a second time to quash the notice of taking the depositions.[5] A hearing was held on the second motion

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[4] Judge Merhige, in commenting on the Board's inconsistent actions, stated "I too want to know why December? I too want to know whether this is retribution because a suit had been filed?" App., *infra*, p. 27a.

[5] The Court of Appeals said in passing that " . . . his [Novak's] release on parole unquestionably mooted the issues raised in his complaint . . . " App., *infra*, p. 4a. That conclusion is erroneous. In a suit brought as a class action, even before the determination of the validity of proceeding as a class action, the altered status of the named plaintiff should have no bearing on the continuation of the suit. *Gaddis* v. *Wyman*, 304 F. Supp. 713, 714 (S.D.N.Y. 1969). The claimed ineligibility of the named plaintiff is not dispositive as to the status of the case with respect to the remaining members of the class. *Jenkins* v. *United Gas Company*, 400 F.2d

to quash on October 17, 1972, and the District Court (Hon. Albert V. Bryan, Jr.) denied this motion, saying that discovery would aid the Court in its class action determination. App., *infra*, p. 31a.

At the hearing on October 17, 1972, there being no objection by the government, the district judge granted a motion for leave to file a complaint-in-intervention. With the exception of the specific factual backgrounds of the three named plaintiff-intervenors, federal prisoners who were denied parole, the complaint-in-intervention contains precisely the same allegations as the original complaint.[6]

Thereafter, the plaintiff-intervenors served the defendants with three sets of interrogatories which asked specific questions with respect to the plaintiff-intervenors as well as other named federal prisoners who are prospective members of the class and which were directed to the same factual issues developed in connection with Novak. The

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28 (5th Cir. 1968). Voluntary compliance and the cessation of claimed illegal conduct on the part of the defendant is not grounds for dismissing an action as being moot. *Chandler* v. *Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74, 135 (1970); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-3 (1953).

[6] The Court of Appeals decision distinguishes the two complaints even though the question of their being different was raised at the oral argument in that court. At that time, it was pointed out that the complaints were precisely the same with the exception that, as result of a typographical error, one sentence which appears as paragraph 14 in the *Novak* complaint in the first cause of action was inadvertently omitted from the complaint-in-intervention when it was typed. In addition to this having been brought to the court's attention during oral argument, it was specifically brought to their attention again in the petition for rehearing with the further observation that the inadvertent omission is made obvious from examination of the first cause of action in the complaint-in-intervention where the paragraph numbering skips from 16 to 18, with the missing 17 being the missing sentence.

defendants refused to answer the interrogatories, except for some, but not all, interrogatories as to the three named plaintiff-intervenors, on the grounds that the others were not parties to the suit. The plaintiffs moved for an order under Rule 37, Fed. R. Civ. Pr., seeking to compel the defendants to answer the interrogatories, and the District Court (Merhige, J.) granted that motion after a hearing on January 17, 1973. App., *infra*, p. 46a.

The defendants filed a petition for a writ of mandamus in connection with the depositions on November 9, 1972, and a second petition for a writ of mandamus in connection with the interrogatories on February 7, 1973. On March 29, 1973, the Court of Appeals ordered that the two mandamus petitions be consolidated for briefing and oral argument and on April 24, 1973, the Court of Appeals entered an order staying all further proceedings in the District Court.

On September 26, 1973, the Court of Appeals issued its opinion directing that the writs of mandamus issue against the district judges vacating their orders with respect to the depositions and interrogatories. A petition for rehearing *en banc* was timely filed and denied on October 17, 1973.

## REASONS FOR GRANTING THE WRIT

### I.

**It is important that it be settled that the Board of Parole does not have absolute discretion in granting parole, that its procedures are judicially reviewable and that due process applies to its deliberations.**

The Court of Appeals granted mandamus against the District Court's discovery orders because it believed that the jurisdiction of the District Court was "tenuous". App., *infra*, p. 8a. This was based in turn on the assertion that the discretion of the Parole Board is "absolute". App., *infra*, p. 6a. While petitioners contend *infra* that the grant of mandamus was unwarranted under governing mandamus law, the underlying assertion of the Board's absolute discretion is the important federal question, not previously settled by this Court, that primarily warrants this Court's grant of the writ of certiorari.[7] Furthermore, the decision of the Fourth Circuit is in direct conflict with a recent decision of the United States Court of Appeals for the Eighth Circuit. *Burton* v. *Ciccone*, 484 F.2d 1322 (8th Cir. 1973).

#### A. *It Is Vital That It Be Established That the Board of Parole Does Not Have Absolute Discretion and That Its Processes Are Judicially Reviewable by the Same Standards Which Apply to Any Federal Agency.*

There is a recognized distinction between administrative discretion in judgment and decision, and discretion in pro-

[7] This Court has recently considered similar issues with respect to the parole revocation process. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

cedure. *Oestereich* v. *Selective Service Local Board No. 11*, 393 U.S. 233 (1968); *Burton* v. *Ciccone, supra*, at 1324. The complaint in the District Court does not challenge the judgment of the Board of Parole nor its individual decisions. It does attack the procedures of the Board by which it arrives at the point of exercising its statutory discretion to make decisions.

The Court of Appeals relied in large part on the Fifth Circuit's *en banc* decision in *Scarpa* v. *U. S. Board of Parole*, 477 F.2d 278 (5th Cir. 1973)[8] which found no merit in a prisoner's complaint against the Board of Parole, because, in the Fourth Circuit's reading of the case, the Board has absolute and unique discretion. However, with the exception of *Tarleton* v. *Clark*, 441 F.2d 384 (5th Cir. 1971), the cases relied on by the Court of Appeals do not stand for any assertion of absolute discretion but only for the same judicial reluctance to interfere that is found in review of any administrative agency.

In spite of this reluctance, it is clear that there can be no absolute discretion in any administrator or in any agency, since no agency has the discretion to make its decisions unlawfully or arbitrarily. *Green* v. *McElroy*, 360 U.S. 474 (1959); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Peters* v. *Hobby*, 349 U.S. 331 (1955). There is

[8] After the Fourth Circuit's decision, this Court granted certiorari, vacated the *en banc* decision in *Scarpa*, and remanded the case to the Court of Appeals for the Fifth Circuit to consider the question of mootness. O.T. No. 73-5053, October 9, 1973, 42 U.S.L.W. 3193. In its addendum opinion on November 8, 1972, App., *infra*, p. 11a, the Fourth Circuit said that it did not feel that this disposition indicated any disapproval of the substance of the *Scarpa* decision by this Court. The prisoners' allegations in *Scarpa*, in connection with the Board's regulations, are almost identical to those in the instant case.

no grant of unbridled administrative discretion to an administrator, *Bowles* v. *Willingham*, 321 U.S. 503, 514 (1944), and an administrative or executive agency must comply with its own regulations, *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Therefore, when there is a claim, as there is here, that the agency is acting unlawfully, and in violation of its own regulations, judicial review is both necessary and essential.

Judge Tuttle, dissenting from the *en banc* opinion in *Scarpa*, disposed of the absolute discretion contention this way:

> Of course, courts cannot reverse a denial of parole, nor order parole granted, but I suggest that no member of this court would hesitate a second to join in court action invalidating either a regulation by the Board or a proceeding by it if it were acknowledged that its action was a result of a policy or regulation to the effect that no consideration for parole would be given to any particular class of prisoners or to any person convicted of a particular crime. Such a course of action would be so obviously arbitrary and an abuse of discretion that it would be stopped in a moment. So much, then, for the 'absolute discretion' proposition. 477 F.2d at 286.

In *Burton* v. *Ciccone*, *supra*, a federal prisoner contended that his hearing before the Board of Parole violated the rules of the Board in that they did not have before them all of the relevant data required by their own rules. That is precisely one of the claims made by the plaintiffs in this case, and indeed, Judge Merhige has already found such a violation of the Board's regulations. The government,

relying on an earlier Eighth Circuit decision, *Brest* v. *Ciccone*, 371 F.2d 981 (8th Cir. 1967), a case also relied upon by the Court of Appeals below, took the position that courts have no right to question decisions of the Board. The Eighth Circuit answered that contention by saying:

> We think the government misses the point. Even though *Brest* teaches us that we cannot substitute our decision for that of the Parole Board, we think it clear that the Parole Board must substantially comply with its own rules and regulations in reaching its decisions. See, *Scarpa* v. *United States Board of Parole*, 477 F.2d 278, 284 (5th Cir. 1973) (Clark & Simpson, JJ., concurring). 484 F.2d at 1324.

Thus the conflict between the Fourth Circuit in the instant case and the Eighth Circuit in *Burton* is sharpened by both courts' relying on similar authorities to reach opposite conclusions.

A number of recent decisions have rendered the Fourth Circuit's reasoning and earlier precedents[9] obsolete. The Seventh Circuit clearly asserted the courts' power to review the Board's action in *Farries* v. *Board of Parole*, 484 F.2d 948 (7th Cir. 1973), when it reversed the District Court's dismissal of a complaint and remanded for a hearing on the prisoners' allegations of racial discrimination in denial of parole. See also *Masiello* v. *Norton*, 364 F. Supp. 1133 (D. Conn. 1973) (requiring that the Board classify prisoners for parole consideration according to rational and reviewable processes); *Pickus* v. *U. S. Board of Parole*, —— F.

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[9] See for example, *Tarleton* v. *Clark*, *supra*; *Bozell* v. *U. S.*, 199 F.2d 499 (4th Cir. 1952); *Thompkins* v. *Board*, 427 F.2d 222 (5th Cir. 1970); *Menechino* v. *Oswald*, 430 F.2d 403 (2nd Cir. 1970).

Supp. ——, C.A. No. 112-73 (D.D.C. July 26, 1973) (appeal pending) (holding that the Board is an agency within the meaning of, and subject to the rulemaking requirements of, the Administrative Procedure Act).[10]

**B. *This Case Is Important Because It Offers the Opportunity to Apply the Clear Import of* Morrissey v. Brewer, *408 U.S. 471 (1972) to Parole Proceedings.***

A number of recent cases have recognized and required various elements of due process to be accorded prisoners' applications for parole. However, there has been substantial difference of judicial opinion on the question of what process is due.

In *Johnson* v. *Heggie,* 362 F. Supp. 851 (D. Colo. 1973), the court found a prisoner's complaint moot in light of a state board's promulgation of regulations requiring written reasons for parole denial. Despite the conclusion of mootness, however, the court held that both prisoners and the state had substantial interests in giving reasons for denial, the former to enable them to correct themselves, the latter to assure that inmates be and can be rehabilitated, at 857.

In *Childs* v. *U. S. Board of Parole,* —— F. Supp. ——, 14 Cr.L.Rptr. 2135 (D.D.C. October 15, 1973) (appeal pending), after a finding that due process was required in parole application hearings based on that court's view that "the slate has been wiped all but clean by *Morrissey,*" the district judge ordered the Board to state its reasons for denying parole, to make regulations allowing prisoners access to and opportunity to respond to the information before parole reviewing panels and to develop explanations

[10] 5 U.S.C. §551, *et seq.*

of the criteria to be considered in passing on applications for parole.

In *Masiello* v. *Norton,* 364 F. Supp. 1133 (D. Conn. 1973), the court found the Board's treatment of a prisoner's parole application inconsistent with due process when its classification of the petitioner as a member of "organized crime" was without basis in fact in the record before the Board and when the prisoner had no opportunity to present proof to the contrary. The court ordered another hearing and an opportunity to respond to the "organized crime" designation, a classification which, though permissible, "results in additional restrictions in the prison and adversely affects the chances for early parole." 364 F. Supp. at 1135. It also concluded that the Board had violated its own regulations in a "pilot project" in which it was "experimenting" in some prisons (including Danbury where Masiello is confined) with giving prisoners reasons for denial of their parole applications.

In a case dealing with the New York State parole system, a district court recently concluded that due process requires the parole board to disclose to a prisoner the ground on which parole was denied. *U. S. ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 363 F. Supp 416 (E.D.N.Y. 1973) (appeal pending). Judge Dooling said:

> That does not mean that the Board must make findings of fact, and must comment on every item in the prisoner's file and relate it to the standards of the statute governing parole. It does mean that the Board must, however briefly, state the ultimate ground of its decision in denying parole with sufficient particularity to enable the prisoner to understand how he is

expected to regulate his conduct and to enable a reviewing court to determine whether inadmissible factors have influenced the decision, and to determine whether discretion has been abused. *Id.*, at 419.

In *U. S. ex rel. Harrison* v. *Pace*, 357 F. Supp. 354 (E.D. Penn. 1973), a prisoner asserted by mandamus that he was entitled to have reasons for denial of his parole application. The Court held that "[t]he rudiments of procedural due process are not observed unless the administrative body details the reasons for its findings," *supra* at 356, citing *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The court also noted the application of due process guarantees to the parole regime in *Morrissey* v. *Brewer*, *supra*. The procedural fairness of giving reasons and the usefulness of having a proper basis of judicial review led the court to hold that "a prisoner's interest in the grant or denial of parole is entitled to constitutionally protected due process considerations, limited to a statement of reasons upon denial of such parole." 357 F. Supp. at 357.

Though *Morrissey* v. *Brewer*, *supra*, was concerned with parole revocation procedures, the language of the decision and the logic of its sequelae show a rapid progression toward a legal conclusion that due process applies to prisoners' applications for parole with all the same constitutional compulsion that applies to revocation of probation[11] and parole. All the important reasons in part II of the opinion for applying due process to parole revocation apply as strongly in law and logic to the prisoner's application for parole. Indeed, this Court first framed the issue

[11] See *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

of the case in *Morrissey* as whether due process applies to the parole system. This Court extended the rights accorded by *Morrissey* to the revocation of probation in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

The District Court in the District of Columbia has recently extended *Morrissey's* holdings to parole application hearings before the Board. The court there recognized the inconsistency of its holding with that of the contemporary decision in *Scarpa, supra.*

> When we examine the nature of the interest of the parolee facing revocation and that of the parole applicant in the light of the ultimate effect of the Parole Board's determination, it appears obvious that the difference is not enough to exclude the applicant from due process protections . . . because the stakes are the same . . . It appears that the application must of necessity fall under the canopy of minimal due process requirements claimed by the plaintiffs. . . . *Childs* v. *Board*, —— F. Supp. ——, 14 Cr.L.Rptr. 2135 (D.D.C. October 15, 1973).

The New Jersey Supreme Court required that state prisoners be accorded reasons for parole denial in *Monks* v. *Board*, 277 A.2d 193 (1971), relying on fundamental fairness and the need for a basis for judicial review.

Both the trend of cases applying due process to the Board's consideration of parole applications and the scope of *Morrissey* require that such applications fall within the scope of constitutionally mandated due process. This case is important as an opportune forum for the presentation and resolution of the rising judicial debate over what process is due.

## II.

**The granting of the writ of mandamus goes so far beyond the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. It also establishes a conflict between circuits on the specific question of whether or not mandamus may be granted to vacate discovery orders to the Board of Parole.**

As we pointed out, *supra,* the Court of Appeals granted mandamus against the discovery orders because it held that the Board of Parole had absolute discretion and that therefore the District Court's jurisdiction was tenuous and the orders themselves erroneous. It follows then, that if the Court of Appeals was incorrect in that holding, as we argue, *supra,* it was improper to grant the writs of mandamus.

Furthermore, the grant of mandamus here is not within the standards which permit issuance of the writ. Traditionally it has been issued only to correct a usurpation of power by a district judge, *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964), or in some other exceptional circumstance. *Will* v. *United States,* 389 U.S. 90, 108 (1967) (Justice Black concurring). Neither of those criteria was alluded to in the opinion of the Circuit Court.

Some cases have granted mandamus on grounds more liberal than usurpation of power. This Court has said that the writ may be supervisory, *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957), or advisory, *Schlagenhauf* v. *Holder, supra.* In the Court of Appeals decision it is neither. The issue presented below was not novel,

*Schlagenhauf, supra,* at 111; nor the subject of widespread abuse, *LaBuy, supra,* at 258. The opinion is far from a model for the instruction of District Judges. *Will* v. *United States, supra,* at 107. The pragmatic effect of the Court of Appeals decision is to leave the District Court no choice but to grant summary judgment for the defendants, precisely what this Court warned against in *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379 (1953). Thus the plaintiffs will never have the opportunity of proving the serious allegations in their complaint.

The Circuit Court cited its own case of *United States* v. *Hemphill,* 369 F.2d 539 (4th Cir. 1966), to justify its broad application of the writ. *Hemphill,* however, is a poor example of a mandamus action by any standard, depending as it does on the fact that there the district court judge ordered discovery upon a mistake of fact and that upon appeal the information sought was acknowledged by respondents to be irrelevant.

However liberal may be contemporary standards for granting mandamus, it does not lie merely as corrective for error, *Bankers Life and Casualty Co.* v. *Holland, supra,* and see *Securities Exchange Commission* v. *Stewart,* 476 F.2d 755 (2d Cir. 1973), in which the panel expressly disapproved of the action of the district judge; see also *Chemical and Industrial Corp.* v. *Druffel,* 301 F.2d 126 (6th Cir. 1962). Nor can the writ be used to compel a judge to decide a case a particular way or as a substitute for appeal. *Zerilli* v. *Thornton,* 428 F.2d 476 (6th Cir. 1970).

The Court of Appeals in the instant case made its decision in favor of mandamus on the express ground that

"the orders of the respondents [are] clearly erroneous." App., *infra*, p. 9a. This is one ground on which mandamus may not be granted. *Chemical and Industrial Corp.* v. *Druffel, supra*, at 129; *United States* v. *Hemphill, supra*, at 544, fn. 7. Here the Court of Appeals virtually assumes the role of a "roving commission to supervise" district courts which this Court expressly disclaimed in *LaBuy, supra*, at 255.

Case law shows conclusively that administrators may be examined by discovery to require them to explain their actions. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1970). Requests for discovery are considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action. *Rogers* v. *Tri State Materials Corp.*, 51 F.R.D. 234 (D. W. Va. 1970); *Cox* v. *Dupont*, 38 F.R.D. 396 (D.S.C. 1965); *Triangle Manufacturing Co.* v. *Paramount Bag Manufacturing Co.*, 35 F.R.D. 540 (D.N.Y. 1964). Information is relevant, even if it may be inadmissible at trial, as long as it is relevant to the subject matter of the action and there is a reasonable possibility that the information sought may provide a lead to other evidence that will be admissible. *Freeman* v. *Seligson*, 405 F.2d 1326 (D.C. Cir. 1968); *Dupont* v. *Phillips Petroleum*, 24 F.R.D. 416 (D. Del. 1959).

The decision of the Fourth Circuit does not rest on the Court's opinion about the general propriety of granting discovery but on its opinion of the adequacy of the complaint in the district court. Judge Merhige's memorandum opinion of August 29, 1972, found, however, that there was a complaint stated upon which relief could be granted. Moreover, case law supports the proposition that the pres-

ence of a jurisdictional issue does not bar discovery either on the jurisdictional issue or on others. *General Industrial Co.* v. *Birmingham Sound Reproducers, Ltd.*, 26 F.R.D. 559 (D.N.Y. 1961).

This aspect of the decision also creates a conflict between circuits. The Court of Appeals for the District of Columbia Circuit has refused, in an application for a writ of mandamus, to vacate an order requiring the Chairman of the Parole Board to submit to deposition. Citing *Citizens to Preserve Overton Park, supra,* the Court said "the deposition will presumably avoid inquiry into mental processes of a particular decision unless it is genuinely material to substantial issues." *U. S. Board of Parole* v. *Honorable William B. Bryant,* No. 72-1116 (March 22, 1972).

The Court should take this opportunity to clarify the limits of appellate supervision of the district courts by mandamus and to resolve the conflict this decision creates between circuits.

## CONCLUSION

**For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Fourth Circuit.**

Respectfully submitted,

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January 1974

# APPENDICES

**Opinion of the Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 72-2324

---

UNITED STATES BOARD OF PAROLE,

*Petitioner,*

*versus*

HONORABLE ROBERT R. MERHIGE, JR., and
HONORABLE ALBERT V. BRYAN, JR.,

*Respondents.*

---

No. 73-1134

---

UNITED STATES BOARD OF PAROLE,

*Petitioner,*

*versus*

HONORABLE ROBERT R. MERHIGE,

*Respondent.*

---

UPON PETITIONS FOR WRITS OF PROHIBITION OR MANDAMUS

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Argued: May 8, 1973 Decided: September 26, 1973

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Before BOREMAN, Senior Circuit Judge, and
RUSSELL and FIELD, Circuit Judges.

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David G. Lowe, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Petitioner in Nos. 72-2324 and 73-1134; Alvin J. Bronstein (Phillip J. Hirschkop on brief) for Respondents in Nos. 72-2324 and 73-1134.

FIELD, Circuit Judge:

The United States Board of Parole has filed two petitions seeking writs of mandamus; the first, directing the respondents, Judges of the United States District Court for the Eastern District of Virginia, to vacate an order authorizing the taking of the depositions of the members of the Youth Division of the United States Board of Parole; and the second, directing the respondents to vacate an order requiring the Board to answer written interrogatories pertaining to parole determinations made in certain cases involving inmates in ten federal institutions. The orders in question were entered in the case of Bernard J. Novak, et al. v. Gary McCune, et al., Civil Action No. 421-72, in the Richmond Division of the Eastern District of Virginia.

That action was originally instituted by Novak as a class action against the Warden of the Federal Reformatory at Petersburg, Virginia, and the Board of Parole seeking injunctive and declaratory relief after he had been denied consideration for an early parole release. Novak alleged that his application for parole had not been considered in accordance with the regulations of the Board of Parole and, additionally, claimed that he was entitled to (a) access to the substance of the parole hearing examiner's recommendations and report; (b) an opportunity to respond to any adverse aspects of the report; and (c) a statement of the grounds upon which parole was denied. After a hearing respondent Merhige denied Novak's motion for a preliminary injunction, but concluded that the complaint presented a justiciable controversy and that the entertainment of jurisdiction thereof was appropriate.

Incident to the matters considered at this hearing Judge Merhige declined to quash the notice for the taking of the

depositions of the members of the Youth Division of the Board of Parole and these depositions were thereafter scheduled to be taken sometime in mid-October, 1972. Subsequent to this hearing, however, the Board of Parole gave further consideration to Novak's request and ultimately Novak's release on parole was advanced to an effective date of October 4, 1972.

Thereafter, the case came on for further hearing before Judge Bryan on October 17, 1972, at which time counsel for the Board of Parole moved to quash the taking of the depositions on the ground that Novak's parole had mooted the issues raised in his complaint. However, the plaintiff-intervenors, George Rouillard, John Leonard and David O'Neill, had moved for leave to intervene as plaintiffs and tendered their complaint in intervention as being representative of the claims of the class embraced in the original complaint of Novak. Counsel for the Board of Parole advised the court that he did not oppose the motion to intervene and thereupon Judge Bryan denied the motion to vacate the notice of depositions upon the basis that they were appropriate for consideration upon the question as to whether or not the action was maintainable as a class action.

Shortly thereafter the plaintiff-intervenors served on the defendants a set of interrogatories seeking information relating to the parole consideration given the three plaintiff-intervenors and twenty-two additional inmates of the Petersburg Reformatory. These interrogatories contained a series of thirty-one questions relating to the parole process and decisions of the Board. The Board responded to thirty of the interrogatories with respect to the three plaintiff-intervenors, but declined to answer the interrogatories

relative to the other twenty-two inmates. The Board also declined to answer the thirty-first question which requested "the names and institutional numbers of all inmates at the Federal Reformatory at Petersburg, Virginia, who have been denied parole release either by way of continuation, set-off or outright denial since January 1, 1971." Thereafter the Board was served with a second and third series of interrogatories relative to an additional thirty-one and twenty-eight inmates, respectively. The second set of interrogatories addressed itself to inmates of the Reformatory at Petersburg, and the third sought information with respect to inmates of nine other federal institutions. The Board declined to answer the questions in the second and third series of interrogatories whereupon the plaintiffs moved for an order compelling the defendants to answer. After a hearing on this motion on January 17, 1973, Judge Merhige ordered the defendants to answer all questions contained in each set of interrogatories within ten days thereof. It is this order to which the second petition of the Board is addressed.

Assuming that the depositions of the Youth Division were appropriate in Novak's case, his release on parole unquestionably mooted the issues raised in his complaint and, nothing more appearing, the notice for the taking of the depositions should properly have been vacated. The question remaining, however, is whether the depositions, as well as the series of interrogatories, are appropriate in the light of the allegations of the plaintiff-intervenors.

A review of the complaint in intervention indicates only that the three intervenors are inmates of the Federal Reformatory at Petersburg and that they have been denied release on parole. Unlike Novak, they do not allege that

their applications for parole were not considered by the Board in accordance with its regulations. Rather, the various grounds for relief assigned by them represent nothing more than a broad-front challenge of the federal parole procedure including the contention, among others, that the regulations promulgated by the Board, 28 C.F.R. §§ 2.1, *et seq.*, are at variance with the statutory grant of parole authority under 18 U. S. C. §§ 4201, *et seq.* The allegations of the complaint in intervention raise only questions of law and we fail to see any necessity for extensive evidentiary development,[1] particularly the depositions of the members of the Youth Division as well as the exhaustive interrogatories, for determination of the issues raised therein.

As heretofore stated the district court concluded that Novak's complaint presented a justiciable controversy, and in reaching this conclusion the court placed primary reliance upon the panel decision in *Scarpa* v. *U. S. Board of Parole,* 468 F. 2d 31 (5 Cir. 1972). The complaint in *Scarpa,* which was strikingly similar to the one at hand, was summarily dismissed by the district court for failure to state a justiciable issue upon which relief could be granted. Upon appeal the panel, one judge dissenting, reversed. Subsequent to the filing of the petitions in the present case, however, the Fifth Circuit, sitting in banc, reversed the decision of the panel and affirmed the action of the district court. *Scarpa* v. *U. S. Board of Parole,* 477 F. 2d 278 (5 Cir. 1973). In so doing the court reaffirmed its decision in *Tarlton* v. *Clark,* 441 F. 2d 384 (5 Cir. 1971), wherein it had stated:

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[1] Intervenor Rouillard presents certain factual allegations but the nature of them rests within his own knowledge.

> "By the language of Title 18 U. S. C. A. § 4203, the Board of Parole is given absolute discretion in matters of parole. The courts are without power to grant a parole or to determine judicially eligibility for parole. United States v. Frederick, 405 F. 2d 129 (3rd Cir. 1968). Furthermore, it is not the function of the courts to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination." 441 F. 2d 385.

In adhering to its prior position, the Fifth Circuit was in accord with the clear weight of authority. *Buchanan* v. *Clark*, 446 F. 2d 1379 (5 Cir. 1971), *cert. denied* 404 U. S. 979 (1971); *Thompkins* v. *U. S. Board of Parole*, 427 F. 2d 222 (5 Cir. 1970); *Brest* v. *Ciccone*, 371 F. 2d 981 (8 Cir. 1967); *Cagle* v. *Harris*, 349 F. 2d 404 (8 Cir. 1965). We also note that this court gave short shrift to a case of a similar nature in *Bozell* v. *United States*, 199 F. 2d 449 (4 Cir. 1952).

The foregoing cases recognize the unique discretion committed to the Board under 18 U. S. C. §4203,[2] and the necessity for the confidentiality of its records. In our opinion, the members of the Board or the Youth Division should be subjected to depositions under only exceptional circumstances, and we perceive no such circumstances in this case.

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[2] 18 U.S.C. § 4203 reads in pertinent part:

> "(a) If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, *the Board may in its discretion authorize the release* of such prisoner on parole." (Emphasis supplied.)

Similarly, we find no justification for subjecting the Board to the burden of answering the broad range of interrogatories submitted by the plaintiffs. The scope of the interrogatories bears little, if any, relation to the questions of law which the plaintiffs seek to raise, and to permit them to probe into the parole consideration of seventy-eight federal prisoners who are not parties to this suit would, in our opinion, violate the recognized confidentiality of the Board's records and place an unreasonable burden on the parole authorities. Chief Judge Brown recognized the judicial folly of such a course in his concurring opinion in *Scarpa* when he stated:

> "It is easy to say that some character of factual hearing must be had to determine whether these conclusory allegations are supportable. But to apply mechanically procedural rules appropriate to an ordinary damage suit to the situation of prisoner parole problems imperils the parole structure and its beneficent aims. With unrestricted access to the nearest Federal Court and the ease with which denial of broad constitutional claims can be asserted, the prison-parole authorities might have to answer almost daily the complaints of numberless prisoners dissatisfied with the progress or lack of progress with their current requests. Federal Courts must, of course, be open to prisoners. But unless access to a Court is to become an illusion from the judicial system being powerless to act from the sheer volume of such claims, we must be certain when importuned to interfere that the complaint realistically read shows arbitrary action constituting abuse of administrative discretion." 477 F. 2d at 283.

Recognizing as we do that the depositions and interrogatories authorized by the respondents were inappropriate in

this case where the complaint rests upon such a tenuous jurisdictional basis, we feel that mandamus is appropriate. The traditional view that mandamus should be confined to instances of clear error going to the question of jurisdiction or power of the lower courts has been supplemented and expanded by the Supreme Court in its decisions in *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), and *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).[3] In *LaBuy* the Court affirmed the issuance of a writ of mandamus by the Seventh Circuit where "the supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration of the federal system." 352 U. S. at 259-260. In *Schlagenhauf*, the Court approved the issuance of the writ to vacate an order of the district court which authorized the oppressive use of Rule 35 of the Federal Rules of Civil Procedure. We feel that the petitions of the Board in the present case fall within the rationale of both of these decisions.

We find nothing in *Will* v. *United States*, 389 U.S. 90 (1967), cited by the plaintiffs, which militates against our conclusion. The decision in *Will* dealt with an order in a criminal case and upon its particular facts was characterized by the Court as "a writ without rationale." The somewhat limited scope of that decision is illustrated by the concurrence of Mr. Justice Black who stated that while finality was "relevant to the right of appeal [it] is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an

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[3] *See* Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 600-601 (1973); 9 Moore's Federal Practice ¶110.26 at 283-284 (2d ed. 1973).

order." 389 U. S. at 108. While some courts have continued to cling to the more restrictive and inflexible concept of mandamus,[4] this court specifically declined to follow them in *United States* v. *Hemphill*, 369 F. 2d 539 (1966). We adhere to that position and since we find the orders of the respondents to be clearly erroneous and that compliance therewith would effect a disruptive and unwarranted intrusion upon the records and resources of the Board of Parole, the writs of mandamus will issue in accordance with the prayers of the petitions.

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[4] In his opinion in the case of In Re Josephson, 218 F. 2d 174 (1 Cir. 1954) Chief Judge Magruder gives an interesting and informative history of the use of mandamus by the federal appellate courts and criticizes the expansion of the writ. *See also* Bank Line v. United States, 163 F. 2d 133 (2 Cir. 1947). *Cf.* dissenting opinion of Judge Lumbard in United States v. DiStefano, 464 F. 2d 845, 851 (2 Cir. 1972).

**Addendum to Opinion of the Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 72-2324

---

UNITED STATES BOARD OF PAROLE,

*Petitioner,*

versus

HONORABLE ROBERT R. MERHIGE, JR., and
HONORABLE ALBERT V. BRYAN, JR.,

*Respondents.*

---

No. 73-1134

---

UNITED STATES BOARD OF PAROLE,

*Petitioner,*

versus

HONORABLE ROBERT R. MERHIGE,

*Respondent.*

---

UPON PETITIONS FOR WRITS OF PROHIBITION OR MANDAMUS

---

ADDENDUM TO OPINION

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(Filed November 8, 1973)

ADDENDUM

Shortly after our opinion in this case was filed the Supreme Court (Mr. Justice Douglas dissenting) by order of October 9, 1973, granted certiorari in *Scarpa* v. *United States Board of Parole*, 42 LW 3193. By its order the Court vacated the judgment and remanded the case to the United States Court of Appeals for the Fifth Circuit for consideration of the question of mootness. We do not feel that this disposition of *Scarpa* by the Supreme Court indicates any disapproval of the substance of the in banc decision of the Fifth Circuit in that case.

**Order Denying Petition for Rehearing en Banc**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 72-2324

---

UNITED STATES BOARD OF PAROLE,

*Petitioner,*

versus

HONORABLE ROBERT R. MERHIGE, JR., and
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*Respondents.*

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No. 73-1134

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UNITED STATES BOARD OF PAROLE,

*Petitioner,*

versus

HONORABLE ROBERT R. MERHIGE,

*Respondent.*

---

UPON PETITIONS FOR WRITS OF PROHIBITION OR MANDAMUS
ORDER DENYING REHEARING

Upon consideration of the respondents' petition for rehearing and suggestion for rehearing en banc;

Now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court as provided by Appellate Rule 35(b) it is ADJUDGED and ORDERED that the petition for rehearing is denied.

JOHN A. FIELD, JR.
*United States Circuit Judge*

A True Copy, Teste:

WILLIAM K. SLATE, II
*Clerk*

By DIANE BURKE
*Deputy Clerk*

(Seal)

FILED
OCT 17 1973

WILLIAM K. SLATE, II
*Clerk*

## Memorandum of United States District Court (August 29, 1972)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 421-72-R

---

BERNARD J. NOVAK, etc.,

v.

GARY MCCUNE, Warden, etc.

---

MEMORANDUM

The plaintiff, presently confined to the Federal Reformatory at Petersburg, Virginia, seeks a declaratory judgment and injunctive relief. The immediate issue before the Court is concerned with whether the plaintiff is entitled to preliminary relief. The action is brought on the plaintiff's own behalf and allegedly on behalf of all federal prisoners at Petersburg who have been refused parole. Jurisdiction is claimed by virtue of 5 U.S.C. §§ 701-706, 28 U.S.C. 1331, 1361 and 2241.

A hearing on the plaintiff's pending motion has been conducted and the Court finds the facts to be as follows:

Plaintiff was taken into custody on October 29, 1970, charged with two unarmed bank robberies. Thereafter he

pleaded guilty to one count of larceny and was sentenced under the Youth Offender Act. He applied for parole release on November 3, 1971, and was given a twelve month "set-off" to be considered again in November 1972. The plaintiff applied for special consideration to the Board of Parole in July 1972 asking for release in September 1972. At that time the Board was advised that plaintiff had completed his high school education while incarcerated, had achieved a score of 650 in the College Entrance Board Examinations, was doing college level work at the Federal Reformatory, had applied for and been accepted as a full-time student for the Fall, 1972, term at Community College of Philadelphia, had promises of two part-time jobs to defray his living expenses, and that he had the prospect of a tuition scholarship from the Philadelphia Friends Committee on Education. The Board was further advised that all of these arrangements might be nullified if he were not released in September, 1972. The plaintiff was recommended for parole release at that time by his prison course instructor, Mr. Jones, the prison psychologist, Dr. Resnick, and his quarters officers. His application was submitted by and with the approval of his caseworker, Mr. Robert Sinsheimer. The Board of Parole, in response to the July 1972 application, deferred any action until November 1972 without advising the plaintiff of their reasons.

On July 17, 1972, William J. Green, Member of Congress from Pennsylvania, at the request of a constituent in Philadelphia (the home town of plaintiff Novak) and after studying the facts in the case, wrote a letter to Dr. William Amos, Chairman of the Youth Division of the United States Board of Parole, requesting that the case be reviewed and reconsidered. On July 27, 1972, Dr. Amos replied in a letter to Congressman Green that:

> From the information available *there is every indication that Mr. Novak has adjusted satisfactorily in the institutional setting. Further, it appears that the parole plans are appropriate.* However, above and beyond these positive factors, we must consider the fact that Mr. Novak robbed two banks for a total of $2,057.00, none of which has been recovered. Another point that must be kept in mind is the fact that *Mr. Novak was a serious heroin user, which contributed to his committing the recent offenses,* and has been responsible for previous arrests and convictions. Therefore, when the total situation is evaluated, taking into consideration the positive as well as the negative points, it is felt that the continuation to November 1972 is not excessive. During November he will be given a parole hearing at the institution, at which time a determination will be made for or against parole based on all the previous information plus any new material that might be available.

In essence, plaintiff's contention is that the Board has failed to act in accord with the intent and purpose of 18 U.S.C. § 42011 et seq., and 28 C.F.R. 2.19.

This Court is satisfied that there is a justiciable controversy. See *Scarpa* v. *U.S. Board of Paroles* (5th Cir., May, 1972). There is no doubt in this Court's mind that the discretion which is accorded to the Board is not an absolute unbridled one. The allegations in his complaint present serious questions attacking proceedings before the Parole Board for arbitrariness and lack of fairness under its own regulations. That issue awaits a hearing on the merits.

The present issue goes to whether the Court has the jurisdiction and authority to grant the relief sought. The

Court is satisfied that it does. At the very least the relief sought may be classified as proper habeas corpus relief which the Court has justification to grant. See 28 U.S.C. § 2241. See also, *Brown* v. *Fogel*, 387 F. 2d 692 (4th Cir. 1962).

The Court has examined in camera the plaintiff's file. The evidence discloses what I consider to be an inadvertent failure of the Board to consider the recommendation of Dr. Resnick, a psychologist, an oversight which I would assume would be forthwith corrected, it now having been brought to the Board's attention. In balancing and weighing the various factors that the Court feels duty bound to consider, the Court has taken into consideration the injury, if any, that might be accorded petitioner should his relief be denied. As the facts indicate, arrangements have been made for him to attend school commencing September 5, 1972, under conditions which give rise to anticipation of continued rehabilitation of the plaintiff. Any delay, however, under his own testimony, will not encompass a disastrous effect. Certain monetary deposits will be lost and there is no evidence as to the effect on the grant which he has been awarded, but there is no reason to assume it would not be just as available at the next semester. On the other hand, while the testimony indicates that preliminary relief will not be disastrous to the defendants, this Court must bear in mind the admonition expressed by Mr. Justice Douglas to the effect that a principle once announced may in time gain a momentum not warranted by the exigencies of its creation. *Porter Co.* v. *N.L.R.B.*, 397 U.S. 99.

It is perhaps appropriate at this time to express the Court's view to the effect that the Court rejects the argument made that there is absolute unbridled discretion

granted the Board in parole matters; nevertheless, this Court is duty bound to exercise judicial discretion to the end that plaintiff's rights are protected and that there be no undue interference with the functions of the Parole Board.

In addition, plaintiff admittedly had a drug addiction problem at the time of his initial incarceration. While the file indicates confidence on the part of those who have had occasion to study the situation, that he is now ready to be released, it is not in this Court's function to act as a "super" parole board, and the Court will deny the plaintiff's motion for preliminary relief.

The Court expresses its confidence that the Board will review the matter as indicated by Mr. Nock, but in such review it ought to be made without consideration of a judicial sword overhanging its deliberations. The Court expects the Board to exercise its discretion based on the entire file.

As sympathetic as the Court is, its discretion is, as I have indicated, not unbridled. I would also like the record to show that indirectly it has been brought to the Court's attention that the absence of Dr. Amos at the hearing on yesterday was by virtue of the lateness of the notice being given to him.

I think it not inappropriate to comment once again that the failure to consider Dr. Resnick's recommendation was, in the Court's opinion, inadvertent; nevertheless, it was, so long as that condition stands unrefuted as it is now, a violation of the regulations.

The declaration of this action as a class action will be withheld until the Court is satisfied, after the taking of discovery by the parties, that the conditions required warrant such declaration.

**Excerpt of Transcript of Hearing**
**(September 22, 1972)**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 421-72-R

---

BERNARD J. NOVAK, *et al.*,

*Plaintiffs,*

—v.—

GARY MCCUNE, etc., *et al.*,

*Defendants.*

---

Richmond, Virginia
September 22, 1972

Before:

HONORABLE ROBERT R. MERHIGE, JR.,
*United States District Judge.*

Appearances:

ALVIN J. BRONSTEIN, Esquire
ARTHUR F. SAMUEL, Esquire
*For the Plaintiffs*

DAVID G. LOWE, Esquire,
*Assistant United States Attorney,*
*For the Defendants*

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## EXHIBITS


| *No.* | *Description* | *In Evidence* |
|---|---|---|
| PX-1 | Letter Bronstein to Nock 9/1/72 | 22 |
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[4] Proceedings

(September 22, 1972) (Friday at 9:10)

The Clerk: Civil Action 421-72-R. Bernard J. Novak versus Gary McCune, et al.

Mr. Alvin J. Bronstein and Arthur F. Samuel represent the plaintiff.

Mr. David G. Lowe represents the defendants.

The Court: Good morning.

Mr. Lowe: Good morning, Your Honor.

The Court: Mr. Samuel, you are also in this one? You are not left over from last night, are you?

Mr. Samuel: Yes, sir, I think I am.

Mr. Bronstein: I think Mr. Samuel's name was mentioned.

The Court: Yes, I know he is here as local counsel.

All right, gentlemen, we are here on your motion, Mr. Lowe.

Mr. Lowe: I believe my motion was filed first, yes, Your Honor. We would like to call Mr. Claude Nock to the stand.

The Court: Come around, please.

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CLAUDE S. NOCK, JR., was called as a witness by and on behalf of the Government and, having been first duly sworn, [5] was examined and testified on his oath as follows:

*Direct Examination by Mr. Lowe:*

Q. Please state your name and occupation. A. Claude S. Nock, Jr., Youth Division, U. S. Parole Board in Washington, D. C.

Q. Mr. Nock, are you familiar with the workings of the Parole Board and its members? A. Yes, I am.

Q. And are you in particular familiar with the workings of Dr. William E. Amos and William Woodward, Jr., and Paul Tennant? A. Yes, I am.

Q. What are their functions? A. Their functions are to vote on parole matters, to review cases, and to deliberate in conjunction with decisions on individual cases heard at the various youth institutions. To issue warrants for those who allegedly have violated, to sign letters addressed to Congress, to review and sign letters addressed to the Federal Courts in conjunction with 5010(e) study cases under the Youth Corrections Act, to review problem cases of those under supervision who have allegedly violated, to make a determination as to whether warrants should be issued or not.

[6] And to confer in general matters relating to administration in the office. To meet together and deliberate in conjunction with the establishing policy. To meet together to discuss and work out strategy on litigation of the various courts throughout the country.

Q. Approximately how many cases do they handle a year? A. There are some 17,000 actions, individual actions, taken as a result of hearings and reviews by progress reports. There are some 2,000 warrants that the Youth Division itself issues during the course of a year.

There are some 400 cases that we set aside convictions for those parolees who have done well under supervision. I think that is probably—

Q. In addition to the other administrative matters that you have mentioned? A. Right.

Q. Now, sir, in making their decisions in parole process do they exercise their judgment and their own reasoning powers to reach the conclusion? A. That is correct.

Q. Thank you.

Your witness.

Mr. Bronstein: I have no questions.

[7] I have no questions, but Mr. Nock is under subpoena from me and I assume he is going to be staying in the court.

The Court: Oh, yes. Thank you, Mr. Nock. You may step down.

(The witness stood aside.)

Mr. Lowe: Your Honor, that is all the evidence that the Government has at this time. We are prepared to argue.

The Court: Mr. Bronstein, do you have anything in reference to the motion to quash? It would seem to me kind of moot. Wasn't the deposition to be taken last week?

Mr. Bronstein: Yes. I have no evidence to offer, but I would like to speak to the issue. I don't think it is moot.

The Court: No further evidence in reference to that particular point?

Mr. Lowe: Your Honor, I think the evidence has established that the proposed deponents are extremely busy people. They are three people who are deciding approximately 17,000 parole cases a year. They are in fact the head of a very large administrative body, that is the Board of Parole, and its system, the prison system. And to submit or subject these people to taking depositions at this time without first [8] going to them with interrogatories would be an undue burden on not only them but on the system that they represent.

It seems to me that any questions could be put in written interrogatory form and answered that way first and then if it is shown there is a need for rigorous cross-examination perhaps that might then be the appropriate time, but here where nothing has been done in the way of asking questions that could be answered by them without interfering with their job, I don't think it is proper.

I would cite the Court to *United States* v. *Morgan*.

The Court: Well, I am familiar with that. That is the Secretary of Agriculture case.

Mr. Lowe: Yes, sir, Your Honor. And it seems to me pretty generally to the point that you should not

take the oral deposition of a very, very busy person and interfere with all of Government.

Now, there are other prisoner rights at stake here, Your Honor.

When you take these people away from their jobs you are delaying just that much more some other prisoner. So it is not just—it is not just an inconvenience to Dr. Amos, it is an inconvenience to the system and an inconvenience to other prisoners who have their rights.

[9] I would also cite the Court to *Wirtz* v. *Local 30, International Union of Operating Engineers*, 34 Federal Rules decision 13. I believe we have cited the authorities.

The Court: I have read them.

Mr. Lowe: So our point is we feel that falls right within those cases and if Courts—it is discretionary with the Court.

The Court: You will agree it is discretionary with the Court?

Mr. Lowe: Yes, Your Honor. I think it is discretionary.

Mr. Bronstein: If the Court please, I think the question of whether Dr. Amos and his colleagues should appear for deposition must be seen in a slightly broader concept.

Mr. Lowe has given me permission to quote a conversation that we had on Monday wherein he advised me if I subpoenaed Dr. Amos and his colleagues to appear in court today they would again refuse to show in court and he would be ordered to move to quash any subpoena to produce them here.

Now, we are in a situation where the plaintiffs are asking for immediate emergency relief. Preliminary relief. So we have a question of timeliness. Dr. Amos has submitted [10] two affidavits, I have just got the second one from Mr. Lowe this morning, purporting to explain the reasons for his actions. Two affidavits contradict each other because today's affidavit puts forth a completely new reason.

Now, if I have to go through interrogatories without being able to question him we will never get the whys and wherefores for the Board's action in this case, action that I think is quite peculiar. This Court in its opinion on August 29 indicated we should take discovery. We attempted to take discovery on the very narrow issue of the most recent action so we could present appropriate evidence to the Court today.

We couldn't get the discovery. We can't get the people in here today. So we only can put on our case and the Court has to decide almost in a void because of the refusal of the Board to appear.

Now, this is precisely what happened in the Sovell case which I think Your Honor is familiar with. It is cited in our original memorandum and supplemental memorandum. In that case the Board Chairman, Mr. Reed, refused to appear, did finally submit two affidavits, and Judge Frankel said that the Board had to acknowledge that possibility, that the affidavit might be stricken. That other subordinates of the Attorney General would have to come [11] to court to vouch justification of their conduct.

He finally indicated that he would make his decision without regard for the fact that they might have other reasons which they are not coming into court to disclose.

And on the question of whether they can be deposed, very recently Mr. Reed, Chairman of the Board of Parole, went to the—

The Court: There doesn't seem to be any question about that. Mr. Lowe admits it is within the discretion of the Court, Mr. Bronstein.

Mr. Bronstein: All right. I think in this situation where we need to find out why they are at where they are rather than affidavits for which there are not support in the file. And I will prove that shortly. It seems to me we ought to be able to depose them or bring them into court whenever we have something of merit to present the Court. I am not trying to harrass the Board.

The Court: All right, sir.

Mr. Lowe: Your Honor, counsel has just given the exact reason given in Morgan as to why they should not be deposed. Counsel is seeking to go into the reasoning that they have behind their acts. This is exactly what Morgan said you cannot do.

Mr. Bronstein: May I make one further point, [12] Your Honor.

The complaint in this case and the motions allege very serious things, that the Board has acted unlawfully in violation of federal law, in violation of their own statute and violation of their regulations. It is more than just the reasons for their action. And if they can't come in and defend themselves against those allegations we will argue that the allegations are true and we will prove them.

The Court: All right, gentlemen. Thank you.

It seems to me that the inconvenience afforded the

members of the Board could hardly be more minimized. It is not a question where you are asking them to come 85 miles or that sort of thing. As a matter of fact the notice contemplated a limited examination. Ten o'clock for one, 11 o'clock for another and 11:45 for the third.

Dr. Amos is going to be accorded 15 minutes more, apparently, than Mr. Tennant. But be that as it may, no, I have no difficulty, gentlemen. I think on the contra it would be an abuse of discretion if I were to sustain this motion to quash.

We are dealing with a matter involving a youth, somebody who was sentenced under the Youth Corrections Act. If I had time—well, if I had 15 minutes I am satisfied I could give you 50 cases in which the Courts speak of the special [13] problems involving the young and the views that Courts take concerning them. No, I don't see any other way we are going to get to it. The motion to quash the deposition is denied.

Let the record show that I have studied all of the cases that have been filed, and obviously I had the motion for further relief and the affidavits filed by Mr. Bronstein, therefore to some extent I have a little bit of the background. I too want to know why December? I too want to know whether this is retribution because a suit has been filed.

I want to know it desperately because I have great confidence in the Parole Board. For five years I have. And if that is going to be the story I want to know it as quickly as possible because I have people coming in front of me every day that I have got to send

to them, or stop sending to them as the case may be. I think Dr. Amos would want me to know. I will be frank with you, I would hope he would.

In any event the notice to quash is denied. Set your time, Mr. Bronstein. Take your depositions.

Mr. Bronstein: Okay.

The Court: Now, there is another motion here that you have filed?

Mr. Bronstein: Yes, Your Honor.

The Court: Do you wish to be heard on that?

**Excerpt of Transcript of Hearing**
**(October 17, 1972)**

[1] IN THE DISTRICT COURT
OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 421-72-R

---

BERNARD J. NOVAK, for himself and on behalf of others similarly situate,

*Petitioner,*

—vs.—

GARY MCCUNE, NORMAN A. CARLSON and MAURICE SIGLER,

*Respondents.*

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Richmond, Virginia
Tuesday, October 17, 1972

The above-entitled cause came on to be heard before The Honorable Albert V. Bryan, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, in the Post Office Building, Richmond, Virginia, commencing at 3:00 o'clock p.m.

Present:

ALVIN J. BRONSTEIN, Esq., and
BARBARA MILLSTEIN, Esq.,
*on behalf of Petitioner;*

DAVID G. LOWE, Esq.,
*Assistant United States*
*District Attorney.*

[2] PROCEEDINGS

The Court: It comes on on two motions, the motion to intervene and the motion to vacate the—there is a motion to quash the subpoena, is that correct?

Mr. Lowe: It is a motion to vacate the notice.

Mr. Bronstein: Before we start, if your Honor please, I understand—I am not a member of the Bar of this Court—that the local rule has been waived today because my local counsel is next door with Judge Merhige. I might notify the Court who is sitting at the counsel table with me. She will not participate in the case, but it is Mrs. Barbara Millstein, who is a member of the Bar of Connecticut and the District of Columbia Bar, but will not participate today.

The Court: Delighted to have you with us.

Ms. Millstein: Thank you.

The Court: Suppose we take up the motion to quash first—or vacate the notice of deposition.

Mr. Lowe: Your Honor, we had a previous hearing on this motion, at which time the motion was denied. Judge Merhige wanted to know the reason why Bernard J. Novak had not been paroled. That was the reason for it.

Bernard J. Novak was the original Plaintiff allegedly representing a class. Affidavits had been filed by the Board members and the Judge felt that they were not [3] sufficient in setting forth sufficient reasons.

Mr. Novak was subsequently paroled on October 4, which makes the issue now moot. I understand, however, there is a motion to intervene so that the class action will continue.

It is still the United States' position, relying on United States v. Morgan and Capitol Vending Company v. Baker

that the depositions of the Parole Board members is improper in that they are the head of an agency.

The evidence at the last hearing was that they handled some 17,000 cases a year that they have to hear and decide.

The depositions, if they are going to be taken on each individual case, on each individual plaintiff, their reasons, goes right in the face of Morgan, which says that you cannot go into the reasoning behind the decision where it is discretionary by an agency.

It is our position that the notice is improper.

The Court: Other than the parole of the original named Plaintiff, has there been any change of circumstances since Judge Merhige's ruling on September 22?

Mr. Lowe: There have been with respect to the basic issues of the case. I have some evidence on that, your Honor.

The Court: Has there been any change supported [4] by any affidavit of the change of position of the deponents or the proposed deponents?

Mr. Lowe: No, your Honor. Their affidavits were that they were—the testimony was that the Board was concerned about the man's taking a job in a hospital where he would have access to drugs. They then changed their position and said, "Any job other than that where you are in a hospital will suffice."

He was transferred to Bucks County Work Release Program—I think it is a Halfway House—and I think he finally obtained a job at a local restuarant and he was paroled. He was paroled on August 4.

The Court: Do you oppose the motion to intervene?

Mr. Lowe: No, your Honor. We do not oppose the motion to intervene.

The Court: All right. The motion to vacate the notice of depositions will be denied. It seems to me it has not been

determined yet whether or not the action is maintainable as a class action.

Until that is so and until discovery is concluded which will put the Court in a position to make such a determination, I don't think there is any more reason now to quash the notice of depositions than there was on September 22. So the motion to vacate the notice of [5] depositions will be denied and the motion to intervene will be allowed.

Mr. Lowe: Your Honor, may the Government put on some evidence with respect to the basic issues of the case which may make the case itself moot?

The Court: At this stage?

Mr. Lowe: Yes, your Honor.

The Court: In support of which motion?

Mr. Lowe: At this time we will make a motion to dismiss on the ground of mootness because a program has just been instituted—I was aware of it—at Petersburg.

The Court: I think that any such motion ought to be in writing supported by authorities, as every other such motion should be, and that Plaintiff's counsel be given notice of it and it should be set down for argument.

I don't want to duck the issue, and I am perfectly willing to hear it if counsel for the Plaintiff are prepared to argue it.

Mr. Bronstein: No, if your Honor please, I would not be prepared, and it is my understanding that Judge Merhige will continue to hear this case in its ordinary course. I think any evidence on new, different issues other than these motions should be heard by Judge Merhige in the ordinary course of business.

The Court: I don't mind hearing it and Judge [6] Merhige wouldn't mind my hearing it, I am sure—he has plenty

to do—but I don't think it is proper to force the Plaintiff into arguing it when it has not even been filed yet.

Mr. Bronstein: Mr. Lowe did inform me of the nature of this testimony a few moments ago, and the nature of it, as I understand it, would require me to put on rebuttal testimony, and since I did not know about it today I would not be prepared to do that, so I think your Honor's original concern about hearing an oral motion is an appropriate one and it ought not to be heard at this time.

Mr. Lowe: Your Honor, could we have a protective order as far as discovery is concerned? Obviously, if we are going into individual files, the matter in those individual files is, of course, confidential and we would like a protective order.

The Court: I wouldn't think counsel would object. Well, I will hear from counsel on that.

Mr. Bronstein: I am not sure I understand the nature of Mr. Lowe's concern.

The Court: Is it the revelation of the information?

Mr. Lowe: Your Honor, I am concerned about the scope of the discovery. If we are limited now to determining whether or not we have a class action or whether or [7] not we are going to go into individual files, that is what I am concerned about.

Mr. Bronstein: If I may, with respect to any files, Judge Merhige previously ordered that any examination of any file either in Court or in deposition that I am to take would be done in camera, and I am under an admonition not to disclose the contents of those files to anyone, and I will certainly respect that.

The Court: Has a protective order of that nature been entered or was that just Judge Merhige's oral announcement from the Bench?

Mr. Bronstein: It was announced from the Bench on the record. I have the transcript of that. He admonished me not to disclose the contents of any file.

If Mr. Lowe's concern is discovery by depositions at this state of the three named witnesses to be deposed which is going to go beyond the scope of their dealings with Novak, I can inform him and the Court now that that is not my intention. The scope of those depositions will deal only with their actions with respect to Plaintiff Novak and how those actions relate to the class action claims, but I will not ask at those depositions about "X" number of inmates or any other files; purely the Novak matter. I don't know whether that satisfies Mr. Lowe.

Mr. Lowe: Your Honor, the Government's point [8] is Mr. Novak has now been released. Again, we are going into the thought processes and we are going right into the United States v. Morgan, which is right on point, that you do not go into the thought processes where it is a discretionary act.

The Court: I can see where discovery could be accomplished without getting into thought processes. It seems to me the procedures or lack of them and the manner in which the Novak case was handled may have some bearing on the rest of the case. I am not that familiar with the case.

I would think that the restrictions that counsel outlined are proper and sufficient, and it probably would be better to incorporate them in an order, though, so that there won't be any misunderstanding about it.

I understand the voluntary limitations you put on the scope of your discovery and the extent to which you will or will not reveal what you ascertain from the files. I believe that ought to be in an order, and will you prepare such an order, please, sir?

Mr. Bronstein: Would I prepare such an order?

The Court: Yes, or you may prepare it together. I don't care who prepares it, just so somebody prepares it.

Anything further?

[9] Mr. Lowe: No, your Honor.

(Whereupon, at 3:10 o'clock p.m., this hearing was concluded.)

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I hereby certify the foregoing is a true transcript of the proceedings reported by me.

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## Excerpt of Transcript of Hearing
## (January 17, 1973)

[1] IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 421-72-R

---

BERNARD J. NOVAK, *et al.*,

*Plaintiffs,*

—v.—

GARY MCCUNE, etc., *et al.*,

*Defendants.*

---

Richmond, Virginia
January 17, 1973

**Before:**

HONORABLE ROBERT R. MERHIGE, JR.,
*United States District Judge.*

**Appearances:**

ALVIN J. BRONSTEIN, Esquire
PHILIP J. HIRSCHKOP, Esquire
*For the Plaintiffs*

DAVID G. LOWE, Esquire,
*Assistant United States Attorney,*
*For the Defendants*

[3] PROCEEDINGS

(January 17, 1973) (Wednesday at nine o'clock)

The Clerk: Civil Action Number 421-72-R. Bernard J. Novak, et al., plaintiff, versus Gary McCune, et cetera, et al.

Mr. Philip J. Hirschkop and Alvin J. Bronstein represent the plaintiffs.

Mr. David G. Lowe represents the defendants.

The Court: Good morning, gentlemen.

Mr. Lowe: Good morning, Your Honor.

The Court: I take it there is a difference of opinion about something, or you wouldn't be here.

Mr. Bronstein: Yes, Your Honor.

The Court: Mr. Bronstein, I will be glad to hear from you.

Mr. Bronstein: This is plaintiffs' motion under Rule 37 to compel defendants to answer fully three sets of interrogatories that were served upon them.

They have answered and objected.

The basic question, with some minor questions in which we allege that they haven't answered fully, but basically they refuse to answer any questions except with respect to the three named plaintiff intervenors on the assigned ground that they are not parties.

[4] I assume that they also mean that the Court has not yet declared this to be a class action.

Aside from the fact that the Court has already said in its August 29 memorandum opinion that you were reserving decision on the class until after the taking of discovery, it is clear that that is not a valid objection.

The Court: Maybe they prefer for me to declare it a class action conditionally.

I don't know. We will see what Mr. Lowe has to say. He usually makes a contribution.

Mr. Bronstein: It is clear that—I won't repeat the cases that we cited in our memorandum of law—that discovery follows Rule 26(b). That says that with respect to parties you are entitled to discover any material relevant to the subject matter of the case including the Board's practices in connection with people who we claim are similarly situated, development of the subject matter of this case.

If the Court wants me to go into the specifics of their other objections—

The Court: No. I will let you reply to Mr. Lowe.

Let's find out why he says they don't want to answer them or won't answer them.

[5] Mr. Lowe.

How do you feel? Is your neck any better?

Mr. Lowe: It goes from day to day. Sometimes it is good, sometimes it is bad.

The Court: Something is happening around here.

Mr. Lowe: Every time Mr. Bronstein comes down here something goes wrong with me.

The Court: There must be a moral to that in view of the fact that you have a pain in the neck.

Mr. Lowe: That is exactly what the doctor diagnosed it as.

The Parole Board's position is, Your Honor, that number one this is not a class action. These people are not members of the class.

The Court: Well, it hasn't been declared a class action as yet.

Mr. Lowe: That is correct, Your Honor.

And the complaint really just seeks to declare the Parole Board's practices and regulations as being unconstitutional. And it is not necessary to go into each individual inmate's file to determine that. All that is necessary is to ask what their procedures are generally.

One other practical aspect of this is the decisions on these other inmates, some of whom are no longer [6] in Petersburg, were made at various times, and as I understand the practice of the Parole Board, it is to take the file and the file is passed from one member to the other who merely notes on there whether or not parole should be granted.

Now, to go back and try to reconstruct in each one of the member's mind what on a certain occasion he decided, what the reasons were for denying parole, would tie them up forever. They may still not be able to give the right answer.

So that in and of itself is one of the basic practical problems.

Now, I understand that situation has changed. I think Mr. Bronstein is aware of it. They are now putting down reasons. And particularly in Petersburg reasons are being given for the denial of parole.

Their basic position is, or our basic position is, that these are not members of the class as of yet and the interrogatories to them are improper.

It would require an inordinate amount of work to answer the interrogatories, plus the fact that it would be violating the confidentiality of the records of the Parole Board.

The Court: I am looking for your motion to quash.

[7] Mr. Lowe: That was a motion to quash.

The Court: I see.

Mr. Lowe: The deposition, Your Honor. We just have stated our objections in the answer.

The Court: Then you did answer some?

Mr. Lowe: We answered with respect to the three named plaintiffs.

The Court: And you answered it fully?

Mr. Lowe: Mr. Bronstein seems to have some question. Perhaps we could find out what that is. I might be able to work it out with him outside of court.

The Court: Let me see if I can find your answer.

Mr. Bronstein: It should be attached to our motion. The interrogatories and the answers were attached to our motion in sets.

The Court: I am sorry. I do see them sitting right here.

All right, address yourself to the particular interrogatories if you will, please, Mr. Bronstein. They have certainly answered, or appeared to have answered on its face, six and fourteen as to the named people.

Now, do you have any complaint about that?

Mr. Bronstein: With respect to the need.

[8] The Court: John Leonard and O'Neill—

Mr. Bronstein: They don't give the name of the person making the recommendation, but we can pursue further discovery. They give the title of a caseworker or social worker.

The Court: Your objection to that is that that portion of it is not fully answered?

Mr. Bronstein: Doesn't sufficiently identify the person making the recommendation so that we can pursue other discovery.

The Court: I suppose it is a similar objection to each of the others?

Mr. Bronstein: With some of them it is a question of very vague answers.

For example, in the answer to question 14 they list a set of factors which come—the factors which we ask that go into the decision-making decision that come out of the regulation book, but they don't specify as to each inmate which factors were relevant. I think they are vague.

For example, "Scientific data and tools," was a factor. I don't know what that means.

With respect to 19, the standards, they merely quote the statute about the interest of society and institutional behavior but don't give any details. Those are [9] the only standards.

With respect to 21 the question is in the case of each inmate, "Was the length of time a factor?" They say that the length of time is considered. They don't say that it was considered and then they refer back to the other factors about the interests of society. It is not clear whether they are saying that it was in these three cases.

With respect to 22, they don't answer the second sentence in the question. They do say that inmates' refusal to participate in the program did play a part in the decision, but they don't say whether they investigated the effectiveness of the program or the inmates' reason for refusal to participate.

With respect to question 30, they answer the first part of the question as to whether there were any adverse reports or comments in the file, but they don't answer the last sentence, "If so, what were those comments and from whom did they come?"

And of course 31 they declined to answer.

They give no reason. I assume it is the same reason as in the first 30, that they are not named parties.

If I may address myself to that issue for a moment, Your Honor. As to how it is relevant to the subject matter, we have already proved that with respect to the [10] plaintiff Novak there was a violation of the Board's own regulations, perhaps inadvertent, but a violation of the regulations. So that this case and the complaint in addition to talking about the regulations being unconstitutional has another cause of action which talks about the Board's activities being unlawful in that they violate their authorizing statute and their own regulations. And on the face of these interrogatories I believe we prove it again.

With respect to the plaintiff intervenor Ruyard, who is a slight, very quiet young fellow, quite young, who is in on his first offense resulting from a drinking problem, stole a car across a state line, they admit this, that the examiner in commenting on plaintiff's application for parole stated, "You are ready for a release. We see no reason not to release you except that you are isolating yourself in the cellblock." This man was homosexually attacked and went into the cellblock voluntarily. In answer to it they give the reason for not being released that he needs time to complete the program, which is just starting. He needs time to solve some problems. He needs to gain insight into his social behavior and problem drinking. He is unable to participate in any problem-solving while in the cellblock. He is in solitary, basically, by his own choosing.

[11] I have a letter here from him which I received yesterday on the way to Petersburg this afternoon in which he says the caseworker was just there to see him again and says unless you get out of the cellblock you are going to be in here for another three years. They deny that our allegations that he is faced with a Hobson's choice, if he goes out he is concerned about being attacked and if he

stays in he doesn't make parole. They admit it except in their interrogatories they give some other reason. We claim that is a violation of the statute.

They are not considering the ends of society by saying come out of the cellblock, submit yourself to possible attack, and then we will consider your parole release.

That is the kind of thing that we would like to discover with respect to other inmates, to see if there is a pattern of the Board's violating the statute and violating their own regulations irrespective of whether on their face they are constitutional.

The Court: All right, sir.

All right, gentlemen, the Court has examined each of the interrogatories and the answers submitted thereto. In particular six, 14, 19, 21, 22, 30 and 31. I conclude as follows: That the defendants shall promptly answer all of the questions in the interrogatories filed as to all of the [12] persons named in each set of interrogatories. The answer to six as given is not complete and will be completed.

14, there appears to be an answer but not as to the—but as to only three.

19 is the same situation. I want it answered.

21, there is only a partial answer.

22, same situation. Only a partial answer.

They haven't answered as to whether the effectiveness of the program was investigated.

30 may, if the defendants are so advised, be answered under a protective order. If there is anything contained in the pre-sentence report that they think ought to be kept from being distributed they may apply to the Court for a protective order and we will set the appropriate terms.

As to 31, while it is objected to, no reasons are assigned therefor and it will be answered.

Now, Mr. Lowe, I wish you would ask the defendants to get these answers in within ten days from this date. As a matter of fact, let me see, I think this proposed order—

Mr. Bronstein: Says ten days.

The Court: Well, I think this proposed order is all right. I will enter it except as to the expenses and fees.

[13] It has been my practice, Mr. Bronstein, to wait until the conclusion of the matter to rule upon those. That will be eliminated from this sketch.

Mr. Lowe: Your Honor, as I indicated, the Board has advised me that it may take some time. May we seek further relief in the form of additional time if it does turn out this is going to be an impossible task?

The Court: Well, of course, that is what Courts are here for, to entertain any motions that come at any time. I want to be reasonable with them and I want them to exercise every right they have, but there has been an inordinate amount of delay on the matter and one, I think, you can understand, that Courts begin to get the impression that they just don't want to do it. You let me know. If ten days doesn't suffice we can make it 12 days or 15 days. There is nothing magic about ten.

Mr. Lowe: When I talked to the Executive Secretary, Your Honor, he advised me that he thought it would take two months.

The Court: Not a chance. They can go to the Fourth Circuit to get that. They are not going to get it from me.

Mr. Bronstein: May I briefly take up one other matter?

[14] The trial is scheduled for February 22nd. Under the terms of your pre-trial order we are supposed to complete discovery next week some time.

Mr. Lowe has no objection, and we think it would make sense, to have a new timetable since we have one part of this matter in the Fourth Circuit now without a decision yet.

The Court: Do you wish to change the trial date?

Mr. Bronstein: I think that would make sense.

The Court: If Mr. Lowe agrees I have no objection.

Mr. Lowe: Yes, Your Honor.

The Court: Well, that automatically extends the pre-trial order, because it is all based on that.

Do you have any suggestions, gentlemen?

Mr. Bronstein: I would say approximately a month to six weeks, if that is convenient to the Court.

Mr. Lowe thinks that is convenient to him.

The Court: How about April 24?

Mr. Bronstein: That is a good day. It is my parents' anniversary. That is fine.

The Court: Mr. Lowe?

Mr. Lowe: Yes, Your Honor.

Mr. Bronstein: Thank you, Your Honor.

The Court: You are welcome, sir.

[15] Mr. Lowe: Your Honor, the Government notes its objection to the entry of the order.

The Court: Yes, indeed.

That will be at 10 o'clock, gentlemen.

(The hearing in the above-entitled matter was concluded at 9:24.)

I certify that the foregoing is a true and correct transcript.

/s/ Gilbert Frank Halasz
Gilbert Frank Halasz
*Official Court Reporter*

## Order of United States District Court (January 17, 1973)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

---

BERNARD J. NOVAK, *et al.*,

*Plaintiffs,*

GEORGE ROUILLARD, *et al.*,

*Plaintiff-intervenors,*

—v.—

GARY MCCUNE, *et al.*,

*Defendants.*

---

ORDER

Upon consideration of plaintiffs and plaintiff-intervenors motion to compel the defendants to answer interrogatories served by plaintiffs and the Court being fully advised, it is

ORDERED, that the defendants shall answer all of the questions in each set of interrogatories filed in the above cited case as to all of the persons named in question 1 in each set of interrogatories, and it is

FURTHER ORDERED, that defendants shall fully answer interrogatories number 6, 14, 19, 21, 22 and 30 of the first interrogatories, and it is

FURTHER ORDERED, that defendants shall fully answer interrogatory number 31 of the first interrogatories as to all potential members of the class of plaintiffs, and it is

FURTHER ORDERED, that defendants shall give their answers to the foregoing interrogatories within ten (10) days from the date of this order.

ROBERT R. MERHIGE, JR.
*United States District Judge*

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1105

HONORABLE ROBERT R. MERHIGE, JR. AND HONORABLE ALBERT V. BRYAN, JR., PETITIONERS

*v.*

UNITED STATES BOARD OF PAROLE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 487 F. 2d 25.

### JURISDICTION

The judgment of the court of appeals was entered on September 26, 1973. A petition for rehearing *en banc* was denied on October 17, 1973 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court below properly issued writs of mandamus directing petitioners to vacate (1) an order authorizing the taking of the deposition of certain members of the Youth Division of the United States Board of Parole and (2) an order requiring the Board to answer written interrogatories pertaining to parole determinations of individuals not parties to this suit who are incarcerated in federal correctional institutions.

## STATEMENT

### 1. THE CRIME AND THE INITIAL DISPOSITION

On May 25, 1971, and June 24, 1971, Bernard J. Novak entered pleas of guilty in the United States District Court for the Eastern District of Pennsylvania to two charges of larceny from two federally insured banks, in violation of 18 U.S.C. 2113(b). He was subsequently sentenced to concurrent indeterminate terms of imprisonment pursuant to the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010. No appeal was taken.

Novak commenced service of his federal sentence at the Federal Reformatory at Petersburg, Virginia, on August 10, 1971. Three months later, on November 3, 1971, he received his initial parole hearing, conducted by an examiner from the Youth Division of the United States Board of Parole. The members of the Youth Division, after considering his application, denied parole and rescheduled him for another hearing in November 1972.

Novak thereafter sought special consideration by the Board of Parole of his request for release in September 1972 to permit him to enter the Community College of Philadelphia. In response to this request, a special progress report was prepared, which evaluated Novak's institutional adjustment and reviewed his release resources and plans. The report concluded with a recommendation from the institution that Novak be released on parole. After consideration of this report, the Youth Division decided that no change should be made in the Board's prior order scheduling Novak for review in November 1972.[1]

[1] In an affidavit submitted at a hearing on this matter on August 28, 1972, Dr. William Amos indicated some of the factors considered in the decision not to change the original order:

"A. At the time of the original hearing, conducted by the Youth Division in November 1971, the record indicated that subject had at least a three year history of heroin usage and that prospects for early change were guarded * * *

"B. The record indicated that subject has a rather long term history of anti-social behavior beginning at age fourteen. He was committed to a disciplinary school at that time and later was committed a second time for a charge of larceny. In addition, he was placed on probation for the illegal possession and use of narcotics in 1969, and in August of 1970, received an additional sentence in the State of Pennsylvania, also for the illegal possession and use of narcotics. These factors, together with his life style, as well as current bank robbery offenses, indicates to me that subject was not an incidental offender or a situational offender, but was a person whose value system requires reorientation, and the classification material in the record supported this opinion.

"C. At the time of the Division's initial order, it was signified in the order that subject should emphasize participation in a drug abuse program. Reports from the institution during the

2. THE INITIAL PROCEEDINGS IN THE DISTRICT COURT

On August 14, 1972, Novak, on behalf of himself and others similarly situated, filed a complaint in the United States District Court for the Eastern District of Virginia seeking injunctive and declaratory relief. He alleged that his application for parole had not been considered in accordance with the regulations governing the Board of Parole and, accordingly, that the Board abused its discretion and deprived him of due process of law. Additionally, he claimed that he was entitled to (a) access to the substance of the parole hearing examiner's recommendations and report; (b) an opportunity to respond to the adverse aspects of the report; and (c) a statement of the grounds upon which parole was denied. The government, on August 25, 1972, filed an answer on the merits of Novak's claim and moved that the complaint be dismissed.

On August 28, 1972, an evidentiary hearing was conducted before Judge Merhige on Novak's motion for a preliminary injunction, at which he testified. The court also heard testimony from an official of the Youth Corrections Division and conducted an *in camera* examination of Novak's institutional file. On the following day, August 29, 1972, the court denied the motion for a preliminary injunction but found that the complaint presented a justiciable controversy and

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past year have indicated that subject had chosen not to continue in this program. They also indicated that subject had dropped a computer training course. In addition, the most recent progress report points out that during the last year subject has incurred two major and one minor disciplinary infractions."

that it had jurisdiction to grant the relief sought (Pet. App. 16a–17a).[2] The district court pointed out that, apparently through inadvertence, the Board had not considered the recommendation of the institution's psychologist. The court suggested that the Board of Parole might wish to study this report and re-examine Novak's application for parole in light of the opinions expressed therein (Pet. App. 17a). The court deferred consideration of the question whether the case should be designated a class action (Pet. App. 18a).

On September 7, 1972, after a review of the psychologist's report and a second report prepared at the Board's behest, the Youth Division issued a new order granting Novak parole effective December 4, 1972, with the special proviso that he participate in an approved counseling program.

### 3. THE ORDER TO TAKE DEPOSITIONS OF THREE MEMBERS OF THE BOARD OF PAROLE

On September 8, 1972, the plaintiff served notice on the respondents of his intention to depose three Board members on September 15, 1972, and subpoenas were issued. On September 22, 1972, after a hearing pursuant to a motion to vacate the notice of deposition, Judge Merhige ordered the members of the Board to

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[2] In support of this conclusion, the district court relied solely upon the three-judge panel opinion in *Scarpa* v. *United States Board of Parole*, 468 F.2d 31 (C.A. 5). However, that decision was subsequently reversed. See *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (C.A. 5, *en banc*), certiorari granted and remanded for determination of mootness, 414 U.S. 809.

submit themselves for deposition.[3] On September 26, 1972, the Youth Division ordered that parole release to a community treatment center be effected October 2, 1972.

On October 4, 1972, three additional plaintiffs moved to intervene on the ground that the cause of action as to Novak had become subject to a claim of mootness. At the hearing on this motion, on October 17, 1972, the government again sought to quash the deposition order, urging that the depositions had been ordered solely to ascertain the basis for the Board's decision to parole Novak in December, and that the matter was moot as to him, since he had been paroled. Judge Bryan declined to change the earlier order of Judge Merhige requiring that the members of the Parole Board be deposed (Pet. App. 31a–32a).[4] He also granted leave for additional plaintiffs to intervene, leaving unresolved, however, the class action question. On November 8, 1972, the Board of Parole petitioned the court of appeals for a writ of mandamus.

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[3] Novak's counsel indicated that the purpose of the depositions was to "get the whys and wherefores for the Board's action in this case, action that I think is quite peculiar. * * * We attempted to take discovery on the very narrow issue of the most recent action" (Pet. App. 25a). The court, in denying the motion to vacate, stated "I too want to know why December? I too want to know whether this is retribution because a suit has been filed" (Pet. App. 27a).

[4] At the hearing, petitioner's counsel stated that "[t]he scope of those depositions will deal only with [deponents'] actions with respect to Plaintiff Novak and how those actions relate to the class action claims, but I will not ask at those depositions about 'x' number of inmates or any other files; purely the Novak matter" (Pet. App. 34a).

4. THE ORDER TO ANSWER INTERROGATORIES

On November 9, 1972, plaintiffs served on the Board a set of interrogatories seeking information relating to the parole consideration given the three plaintiff-intervenors and twenty-two additional federal inmates of the Federal Reformatory. These interrogatories contained a series of 31 questions probing extensively, as to each of the twenty-five inmates, into the parole process and the decisions of the Board in relation thereto. On December 8, 1972, the Board responded to questions 1 through 30 of these interrogatories with regard to the three plaintiff-intervenors, declining to answer interrogatories relating to the other twenty-two inmates, who were not parties to the suit. Additionally, the Board declined to answer the 31st question, which requested "the names and institutional numbers of all inmates at the Federal Reformatory at Petersburg, Virginia, who had been denied parole release either by way of continuation, set-off, or outright denial since January 1, 1971" (Pet. App. 4a). To respond to this inquiry would have required obtaining this information as to approximately 800 individuals, or nearly the total population at Petersburg.

On December 4, 1972, the Board of Parole was served with the second and third series of interrogatories, relating primarily to additional groups of thirty-one and twenty-eight inmates, respectively. While the second set of interrogatories related to inmates of the Federal Reformatory at Petersburg, Virginia, the third set sought information as to inmates of nine other federal institutions. The Board

of Parole declined to answer the questions propounded in the second and third interrogatories, which pertained to individuals who were not parties to the suit.[5] Plaintiffs moved for an order compelling defendants to answer the interrogatories. After a hearing on January 17, 1973, Judge Merhige ordered that the Board answer all questions contained in each set of interrogatories within ten days. On January 29, 1973, the district court denied the Board's motion to vacate its order requiring that the answers be filed. On February 7, 1973, respondents petitioned the court of appeals for a second writ of mandamus.

### 5. THE HOLDING OF THE COURT OF APPEALS

The court below considered the Board of Parole's two petitions for mandamus in this case together, and issued the writs (Pet. App. 1a–9a). With respect to Novak's complaint, the court found that his release on parole mooted the issues raised in his complaint and the deposition order, as it related to him, should properly have been vacated (Pet. App. 4a). As to the three plaintiff-intervenors, the court of appeals found that their pleadings alleged (Pet. App. 5a)

> only questions of law and we fail to see any necessity for extensive evidentiary development, particularly the depositions of the members of the Youth Division as well as the exhaustive interrogatories, for determination of the issues raised therein [footnote omitted].

[5] The Board responded to question 30 of the third set of interrogatories, which requested a statistical breakdown of the total number of decisions made by the Board in granting or denying parole.

The court went on to conclude that only in exceptional circumstances should members of the Board of Parole be subject to depositions (Pet. App. 6a).

Similarly, with respect to the interrogatories, the court of appeals found they bore only slight relevance to the questions of law raised in the complaints and further that interrogatories relating to seventy-eight inmates who were not parties to the suit would "violate the recognized confidentiality of the Board's records and place an unreasonable burden on the parole authorities" (Pet. App. 7a).

## ARGUMENT

Petitioners seek to raise a variety of substantive issues which are not posed by this case, such as the reviewability of actions of the Board of Parole and the impact, if any, of *Morrissey* v. *Brewer*, 408 U.S. 471, on proceedings to consider the initial grant of parole. The sole issue properly before this Court is whether the court below correctly exercised its supervisory power in issuing writs of mandamus directing petitioners to vacate their wide-ranging discovery orders.

The holding of the court of appeals regarding the plaintiff-intervenors was clearly based upon its finding that, in light of the allegations contained in the complaints, the discovery orders had been "clearly erroneous and that compliance therewith would effect a disruptive and unwarranted intrusion upon the records and resources of the Board of Parole" (Pet.

App. 9a).[6] We submit that this ruling was entirely correct.[7]

As petitioners note, both at common law and in early federal practice the writ of mandamus was appropriately issued to a lower court only in those instances where that court had made an error of jurisdictional magnitude. See, *e.g.*, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26–27. See also Comment, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 598–602 (1973). In the last two decades, however, this Court has sanctioned the use of the writ as a proper remedy where there has been a usurpation of judicial power or a clear abuse of discretion. See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260.

*La Buy* arose from two private antitrust suits involving price fixing and price discrimination in the shoe repair industry. The district court, over the objection of the parties, referred the cases to a master pursuant to

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[6] Petitioners apparently do not seriously contest the conclusion that the case is moot as to Novak personally (Pet. 8, n. 5).

[7] Contrary to petitioners' contention, no conflict exists between the instant case and *Burton* v. *Ciccone*, 484 F. 2d 1322 (C.A. 8). In *Burton* the plaintiff asserted, *inter alia*, that the Board did not have before it all the data required by the Rules of the Board. The court of appeals, relying upon a concurring opinion in *Scarpa* v. *United States Board of Parole*, 477 F. 2d 278 (C.A. 5, *en banc*), remanded to the district court for a determination whether the Board followed its rules in conducting that hearing. Here, however, the court below did not reach the merits of plaintiff's claim that the Board failed to follow its own rules, but rather determined that the discovery orders were not necessary to resolve that issue and constituted an abuse of discretion.

Rule 53(b), Fed. R. Civ. P., stating as its reasons the need to relieve a congested calendar, the complexity of the cases, and the fact that they would take a considerable amount of time to try. *Id.* at 253–254. After the court denied motions to vacate the order, mandamus petitions were filed in the Seventh Circuit. The court of appeals issued the writs and this Court affirmed. In rejecting a claim similar to that presented here, *i.e.*, that the court of appeals had assumed the role of a roving commission to supervise the district courts (Pet. 21), this Court concluded that "[s]upervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *Id.* at 250. This ruling was premised on the recognition that the writ of mandamus is properly available to prevent or deter the recurrence of an erroneous practice which the court of appeals seeks to discourage. *Id.* at 258–259. Consonant with this principle, mandamus has been deemed appropriate to prevent enforcement of erroneous or clearly unnecessary orders. See *Pfizer Inc.* v. *Lord*, 456 F. 2d 545, 548 (C.A. 8); *Metros* v. *United States District Court for the District of Colo.*, 441 F. 2d 313, 315 (C.A. 10); *Harper and Row Publishers, Inc.* v. *Decker*, 423 F. 2d 487 (C.A. 7), affirmed by an equally divided Court, 400 U.S. 348; *United States* v. *Hughes*, 413 F. 2d 1244, 1248–1249 (C.A. 5), vacated with directions to dismiss as moot, *sub. nom. United States* v. *Gifford-Hill-American, Inc.*, 397 U.S. 93; *United States* v. *Hemphill*, 369 F. 2d 539, 543 (C.A. 4); *In re United States*, 348 F. 2d 624 (C.A. 1); *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (C.A.

9). See also, 8 Wright and Miller, *Federal Practice and Procedure: Civil* § 2006, pp. 32–33 (1970 ed.).

The holding below fully comports with this line of authority. Here, the complaints of the three plaintiff-intervenors urged that the procedures then employed by the Board of Parole are unconstitutional and at variance with the statutory grant of parole authority.[8] As these procedures were fully set forth in the Code of Federal Regulations and the Rules of the

[8] On September 24, 1973, the Board of Parole issued regulations implementing new procedures for granting parole. 28 C.F.R. 2.13, *et seq.* (38 Fed. Reg. 26653). These regulations require that, after a parole hearing, the panel holding the hearing and making the parole decision "shall inform the prisoner of the decision and, if parole is denied, of the reasons therefor" (28 C.F.R. 2.15(a) (38 Fed. Reg. 26653)). The regulations further provide 28 C.F.R. 2:15(b) (38 Fed. Reg. 26653) that the reasons for parole denial may include, but are not limited to, the following reasons (with further specifications where appropriate):

"(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

"(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

"(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

"(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life."

Section 2.15(c) provides:

"Written notification of the decision shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. If parole is denied, the prisoner shall also receive in writing as part of the decision the reasons therefor." This program became effective on October 1, 1973, in the Board's Northeast Region (see 38 Fed. Reg. 26652 for the area included in the Northeast Region) and is being extended to the remainder of the country as rapidly as personnel and the creation of new facilities permit. These procedures are currently in effect in the federal reformatory at Petersburg.

United States Board of Parole, no factual development was necessary. Moreover, while petitioners seek to characterize their suit as a class action for purposes of unlimited discovery—although the district court has not yet so declared it—this does not alter the nature of the cause of action nor the questions to be resolved. There was thus no basis for permitting plaintiffs to probe the confidential parole records of seventy-eight federal inmates not parties to the litigation; moreover, the interrogatories bore, at best, only slight relevance to the question at issue. In any event, the Board of Parole has responded under oath to those interrogatories concerning the parole determinations made with regard to the plaintiff-intervenors. Thus, we submit, the district court has sufficient evidence to pass on the issue presented.

In these circumstances, the court of appeals properly found compelling and extraordinary circumstances which warranted mandamus relief.[9]

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[9] The unreported decision of the Court of Appeals for the District of Columbia Circuit in *United States Board of Parole* v. *Bryant*, No. 72–1166, decided March 23, 1972, is not in conflict with the opinion below. There, as petitioners note, the court declined to issue a writ of mandamus to prevent the deposition of the Chairman of the Board of Parole. However, the court in *Bryant* noted:

"This court assumes that the District Court, both in providing for oral deposition, and in its contemplation of the conduct of such deposition, has in mind the need for discretion to assure that the discovery will be related to the objective of furnishing the District Court with a basis for ruling on the question before it, that oral discovery going beyond discovery on interrogatories is necessary and will not be unduly burdensome. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420; *Peoples* v. *Department of Agriculture*, 427 F.2d 561, 567. The deposition will

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

HENRY E. PETERSEN,
*Assistant Attorney General.*

JEROME M. FEIT,
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MAY 1974.

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presumably avoid inquiry into mental processes of a particular decision making unless it is genuinely material to substantial issues. In this regard, the transcript reveals that respondent advised plaintiff that he would decline to order production of particular records. There is no doubt of the need for obviating avoidable burdens on the time of the chairman of the Board of Parole, particularly since it appears the board is now engaged in its own consideration of revision of its procedures."

Here, on the other hand, the court of appeals was presented with two discovery orders which contained none of the limitations suggested in *Bryant*. Indeed, with respect to the depositions of the members of the Youth Division, counsel for plaintiff advised the district court that the thrust of the depositions was directed at ascertaining the reasons underlying the decision to grant Novak parole. Therefore, it is evident that plaintiffs intended to inquire into and the district court intended to allow inquiry into, the mental processes of the Board members concerning matters not genuinely material to substantial issues raised by plaintiff-intervenors. As the Court noted, in *United States* v. *Morgan*, 315 U.S. 422, and, indeed, in *Bryant*, such an inquiry is generally impermissible. Furthermore, the order, which requires the Board to respond to lengthy interrogatories, was clearly burdensome and likewise in violation of the District of Columbia Circuit's opinion. Thus, the decision in *Bryant* is factually dissimilar to the instant case and the holding there is inapposite here.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.
MAY 14 19
MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1105

HONORABLE ROBERT R. MERHIGE, JR., AND HONORABLE ALBERT V. BRYAN, JR.,

*Petitioners,*

v.

UNITED STATES BOARD OF PAROLE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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*Petitioners,*

v.

UNITED STATES BOARD OF PAROLE,
*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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## REPLY BRIEF FOR PETITIONERS

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The respondent, in its brief in opposition, argues that the court below was correct in holding that the case is moot as to the original plaintiff Novak and that there are no substantive issues posed by this case.

### I.

### THERE IS NO QUESTION OF MOOTNESS IN THIS CASE.

The respondent argues that the court below properly found that Novak's release on parole mooted the issues raised in his complaint (Res. Br. 8). The respondent goes on to say that the "Petitioners apparently do not seriously

contest the conclusion that the case is moot as to Novak personally." (Res. Br. 10, n. 6.). On the contrary, petitioners vigorously contest that holding and stated in their petition "That conclusion [mootness] is erroneous" (Pet. 8, n. 5.).

Indeed, two cases just decided by this Court reaffirm the correctness of petitioners position. *Super Tire Engineering Company v. McCorkle*, ___U.S.___, 42 U.S.L.W. 4507, No. 72-1554, April 16, 1974; *DeFunis v. Odegaard*, ___U.S.___, 42 U.S.L.W. 4578, No. 73-235, April 23, 1974. In *Super Tire Engineering Company* this Court, distinguishing declaratory from injunctive relief, said that ". . . since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issue presented here 'capable of repetition yet evading review', so that petitioners are adversely affected by government 'without a chance of redress'. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)," and ". . . the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuation and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." 42 U.S.L.W. at 4509.

The complaint in this case seeks declaratory as well as injunctive relief with respect to the alleged illegal governmental activity. In the court below, petitioners argued that Novak, who was then on parole status, could have his parole revoked by the respondent and once again be subjected to the challenged activity. We are surprised that the respondent, in its brief, did not advise this Court that after a hearing on February 14, 1974, the Board of Parole revoked Novak's parole and caused him to be returned to custody at the Federal Reformatory, Petersburg, Virginia,

on March 21, 1974.[1] He will be considered for parole again by the respondent in July, 1974.

Finally, the respondent could grant parole to the plaintiff-intervenors and other members of the prospective class action thereby continually evading review of their actions. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

## II.

### THE COURT OF APPEALS GRANTED MANDAMUS BECAUSE OF AN ERRONEOUS HOLDING ON SUBSTANTIVE ISSUES.

The respondent argues that there are no substantive issues in this case and that the sole issue is whether the court below correctly issued writs of mandamus in connection with discovery orders. (Res. Br. 9). That reading of the Court of Appeals' decision bears little or no relationship to reality.

The court below granted the writs of mandamus because it held that "the clear weight of authority" gives to the Board of Parole "absolute discretion in matters of parole" (Pet. App. 6a), and therefore "the complaint rests upon such a tenuous jurisdictional basis" (Pet. App. 8a). It is obvious that the court of appeals' decision addressed and decided the merits of substantive issues.[2]

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[1] The reasons furnished for revocation were 1) failure to comply with special conditions of parole, and 2) failure to report an arrest. The revocation is presently being appealed by Novak to the National Appellate Board of the respondent. 28 C.F.R. 2.21 (38 Fed. Reg. 26654)

[2] It becomes absolutely clear upon a reading of the addendum to their opinion issued after this Court's action in *Scarpa v. United States Board of Parole*, 414 U.S. 809 (1973). (Pet. App. 10a, 11a.)

We have, in the petition for certiorari, illustrated why we believe the court below was incorrect when it held that the Board of Parole has absolute discretion. See *Burton v. Ciccone*, 484 F.2d 1322 (8th Cir. 1973) and other cases cited in the petition at pages 14-18. We respectfully bring to the Court's attention a number of other decisions, rendered since the filing of the petition, that support our claim that the court below erred on this issue. *Grasso v. Norton*, 371 F. Supp. 171 (D. Conn. 1974), Supplemental opinion, ___F. Supp.___, Civil No. B-813 (D. Conn. Apr. 30, 1974); *Lupo v. Norton*, 371 F. Supp. 156 (D. Conn. 1974); *Candarini v. Attorney General*, 369 F. Supp. 1132 (E.D. N.Y. 1974); *Starks v. Sigler*, ___F. Supp.___, C.A. 4-70230 (E.D. Mich. Jan. 17, 1974); *In re Sturm*, ___Cal. Rptr.___, Crim. 16799 (Sup. Ct. Calif., Apr. 18, 1974); cf., *King v. United States*, ___F.2d___, No. 73-1387 (7th Cir. Mar. 13, 1974).

## CONCLUSION

For the reasons stated above, as well as those stated in the petition for certiorari, Petitioners pray that the petition for certiorari be granted.

Respectfully submitted,

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May, 1974